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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 220

MEYER WEISS,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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INDEX

TABLE OF CASES CITED

PAGE

Other Authorities Cited

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Meyer Weiss, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered herein on June 23, 1947 (137),* affirming the judgment of conviction of the United States District Court for the Eastern District of New York (46).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and under Sections 687, 688 of Title 18, U. S. C., and the Rules of Criminal Procedure adopted thereunder, particularly Rule 37(b).

* All parenthetical numerical references, unless otherwise stated, are to pages in the printed record.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of conviction of the petitioner on June 23, 1947. This petition is filed within thirty days from such date.

Opinions Below

The opinion of the Circuit Court of Appeals (Chase, Clark and Frank, Circuit Judges) has not yet been officially reported. It is printed at pages 133, *et seq.*, of the Record. The opinion of the District Court (Moscowitz, District Judge) is officially reported: 65 F. Supp. 556. It is printed at pages 112 to 125 of the Record.

Statement of the Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment convicting the petitioner of violating the Selective Training and Service Act of 1940 (Title 50, United States Code, Appendix, Section 311), after trial in the United States District Court for the Eastern District of New York before Hon. Grover M. Moscowitz, District Judge.

The petitioner, having waived trial by jury, was tried by the aforesaid District Judge on a stipulated statement of facts, and was found guilty (125). The petitioner was sentenced to imprisonment for a term of one year (46).

The indictment on which the petitioner was convicted in substance alleges that the defendant Weiss and the co-defendants from about May 15, 1944, to December 30, 1944, "did unlawfully, wilfully and knowingly omit and refrain from disclosing to the Local Board duly exercising jurisdiction * * * facts as to the liability of said defendant * * * for service under the provisions of the Selective Training and Service Act of 1940, * * * said defendant * * *

being then and there a person duly registered pursuant to the * * * Act * * *" in that, during said period said defendant "wilfully, knowingly and deliberately omitted and refrained from disclosing to the Local Board duly exercising jurisdiction" of the defendant Weiss the fact that said defendant "was not from June 3, 1944, to December 31, 1944, employed by the Universal Camera Corporation, and that the employment of said Meyer Weiss had terminated on or about June 3, 1944," in violation of Section 311, Title 50, United States Code, Appendix.

There was no evidence establishing that the petitioner "wilfully, knowingly and deliberately," as alleged in the Indictment (6), or even "knowingly," as required by the Act, failed and neglected to perform any duty required of him under the Act or the Regulations. The stipulated and undisputed evidence, indeed, clearly demonstrates that the petitioner conscientiously performed every duty he reasonably believed was required of him.

There was no evidence establishing that the petitioner's employment by Universal Camera Corporation had terminated about June 3, 1944, and that the petitioner was not employed by such corporation during the period June 3 to December 31, 1944, as charged in the Indictment (6). The stipulated and undisputed evidence, in fact, establishes that the petitioner's employment by such corporation did not terminate at such time, but that he was actually employed by such corporation during the entire period in question, being merely on a *bona fide* leave of absence during such period.

No fact occurred during the period mentioned in the Indictment which might have affected the classification of the petitioner. During such time the petitioner was thirty-three years old and employed not only by Universal Camera Corporation but also by Transogram Company, Inc. And the Director of Selective Service for New York City most emphatically advised the Local Boards in such area that

registrants in the thirty to thirty-seven age group who were engaged in practically any activity, so long as they were so engaged, were to be given a deferred classification. Therefore, the petitioner's employment or unemployment at Universal Camera Corporation was not a fact which would have affected his classification.

The petitioner had no duty to report any termination of employment to his Local Board, even if such a termination had occurred. No statute, rule or regulation imposed any such specific duty upon him. And the Director of Selective Service never intended to impose any such duty upon a registrant; on the contrary, the Director stressed his intention to impose such a duty upon the *employer* only. The language of Section 626.1(b) of the Regulations, relied upon by the Government, is too vague, indefinite and uncertain to impose any specific duty upon a registrant, such as the petitioner.

Questions Presented

1. Did the Circuit Court of Appeals err in affirming the judgment of conviction where the stipulated and undisputed evidence failed to show that the petitioner had "knowingly" violated the Selective Service Regulation in question?

2. Did the Circuit Court of Appeals err in affirming the judgment of conviction where the stipulated and undisputed evidence established that there was no termination of employment as alleged in the Indictment?

3. Did the Circuit Court of Appeals err in affirming the judgment of conviction where the stipulated and undisputed evidence indicated that the petitioner failed to perform no duty required of him, no fact which might have affected his classification having occurred?

4. Did the Circuit Court of Appeals err in affirming the judgment of conviction based on Section 626.1(b) of

the Selective Service Regulations, the language of which is too vague, indefinite and uncertain to impose the duty in question and was not intended to impose such duty?

Reasons for Allowance of Writ

1. The decision herein holding that Selective Service Regulation 626.1(b) was not too vague, indefinite and uncertain to set forth a new criminal offense, appears to be in conflict with the principle of such decisions by this Court as *Lanzetta* v. *New Jersey*, 306 U. S. 451, and *Connelly* v. *General Construction Co.*, 269 U. S. 385.

2. This Court has never decided the constitutionality of Selective Service Regulation 626.1(b), and the importance of the question as to whether or not such section is constitutional is indicated by the fact that at least five other cases arising in the United States District Courts for the Eastern District of New York and for the Southern District of New York are now pending either for trial or on appeal before the Circuit Court of Appeals for the Second Circuit or on petition for a Writ of Certiorari to this Court.

3. The Circuit Court of Appeals for the Second Circuit, in affirming the conviction herein, has misconstrued the effect of the word "knowingly" as used in the Selective Service Act and as interpreted by this Court in *Bartchy* v. *United States*, 319 U. S. 484.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a

day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered 20590 and entitled in its docket as "*United States of America,* Plaintiff-Appellee, against *Meyer Weiss,* Defendant-Appellant" and that judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: July 18, 1947.

MEYER WEISS, Petitioner

By I. MAURICE WORMSER and
FRANCIS J. QUILLINAN,
Attorneys for Petitioner,
120 Broadway,
New York 5, New York.

We hereby certify that in our judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated: July 18, 1947.

I. MAURICE WORMSER and
FRANCIS J. QUILLINAN,
Attorneys for Petitioner and Members of the Bar of this Court.

IN THE

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Petitioner,

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UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Indictment

As the First Count of the Indictment was dismissed, only the Second Count need be considered.

The Second Count alleges that the petitioner Weiss and the co-defendants from about May 15, 1944, to December 30, 1944, "did unlawfully, wilfully and knowingly omit and refrain from disclosing to the Local Board duly exercising jurisdiction * * * facts as to the liability of said defendant * * * for service under the provisions of the Selective Training and Service Act of 1940, * * * said defendant * * * being then and there a person duly registered pursuant to the * * * Act * * *" in that, during said period said defendant "wilfully, knowingly and deliberately omitted and refrained from disclosing to the Local Board duly exercising jurisdiction" of the defendant Weiss the

fact that said defendant "was not from June 3, 1944, to December 31, 1944, employed by the Universal Camera Corporation, and that the employment of said Meyer Weiss had terminated on or about June 3, 1944," in violation of Section 311, Title 50, United States Code, Appendix.

The Statute and the Regulations

That part of Section 11 of the Selective Service Act (50 U. S. C. A., App., 311) upon which this prosecution is based reads as follows:

> "*Offenses and Punishment*
>
> "Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, * * *."

The pertinent part of Section 626.1(b) of the Selective Service Regulations, at the time in question, read as follows:

> "Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in such registrant being placed in a different classification."

The Instructions appearing on Form 42 of the Selective Service System, made a part of the Selective Service Regulations by Section 605.51, read as follows (77):

> "Instructions: This form is to be filled by an employer or other person who has knowledge of the registrant's eligibility for Class II deferment as a necessary man in his civilian occupation or activity. *If the registrant is deferred, the employer must*

notify the Local Board promptly of any change in the registrant's job status, or if his employment is terminated." (Italics appear in original Instructions.)

The Trial

With the consent of the Court and of the Government, the petitioner waived a trial by jury. At the commencement of the trial the First Count of the Indictment, charging a conspiracy to violate the substantive offense alleged in the Second Count, was dismissed. The Court severed as to the co-defendants, Universal Camera Corporation, Jesse Norden and Irving Weintraub, and ultimately dismissed as to said co-defendants.

The facts were stipulated. In addition the Government introduced into evidence five exhibits: 1, the Local Board's entire file concerning the petitioner; 2, a card of Universal Camera Corporation bearing the printed caption "Notice of Termination of Service" stating the petitioner was on "leave of absence"; 3, a transcript of the petitioner's interview by Colonel Brady of the Selective Service System; 4, the petitioner's statement to the Federal Bureau of Investigation; and 5, the Universal Camera Corporation's entire file concerning the petitioner. The petitioner introduced into evidence one exhibit: A, the petitioner's Selective Service classification card.

The Facts

The petitioner, Weiss, is 38 years old, having been born in Brooklyn, New York, on April 21, 1909. He was married on November 28, 1936, and has two daughters, one of whom was born on October 2, 1941, and the other on November 15, 1945. He and his family live together in Brooklyn, where he has always lived (18).

Weiss is a lawyer. He received an LL. B. degree from New York University in 1931 and the following year, 1932, was admitted to practice in the New York courts (18).

On February 1, 1938, he began working for Transogram Company, Inc., 200 Fifth Avenue, Manhattan, where he is still employed (27).

On October 16, 1940, Weiss registered under the Selective Training and Service Act at Coudersport, Pennsylvania, where he was then temporarily visiting (18). When registering Weiss advised the Local Board of his sex, his age—"31 years old," and his citizenship—"U. S. A." (49).

On March 24, 1941, Weiss was put in Class 3-A by his Local Board (19). Section 622.31 of the Regulations provided that "any registrant who has one or more dependents" "and who is not engaged in a civilian activity which is necessary to war production or which is supporting the war effort" shall be placed in such class; and Section 622.32 defined "dependent," so far as pertinent here, as "the wife or child of the registrant with whom the registrant maintains a *bona fide* family relationship in their home," provided "such status" was "acquired prior to December 8, 1941, and at a time when the registrant's selection was not imminent."

About April, 1943, Weiss went to 33 Pine Street, Manhattan, where he filed an application for a commission in the Navy. However, he was rejected because of failure to pass the eye-test (101).

On April 14, 1943, he registered with the United States Employment Service where his occupation as a "production manager" was noted. He was told to report back on June 8th. He did so and, no work being available, was told to report again on August 2nd. Being out of town on such date, he did not report back until August 18th when he was again told that there was no work available and to return on October 20th (19).

Weiss went to Belmet Products, Inc., 250 Moore Street, Brooklyn, manufacturers of machine parts for armaments, where on August 27, 1943, he filled out an application for employment (70; 100). He was accepted and told to start work there on September 7th (95; 100).

In a letter dated September 4, 1943, the Local Board wrote Weiss saying (69):

> "Pursuant to Local Board memorandum #181 issued by Selective Service, as amended, August 16, 1943, please be advised that an examination of your file indicates that your present occupation is Non-Deferable.
>
> "You must, therefore, transfer to some other position or register with the United States Employment Service in order to be transferred to other employment.
>
> "This Board grants you 30 days time from date in which to comply with the above, otherwise, we shall reclassify you to 1A for Induction in accordance with Selective Service Regulations."

On September 7, 1943, Weiss started to work at Belmet Products, working on the 4 P. M. to midnight shift. He worked there on September 7th, 8th and 9th. On September 8th, he wrote his Local Board notifying it that he was employed at Belmet Products (70). He quit such job on September 9th, when he learned that he could obtain similar employment at Universal Camera Corporation which was located on 23rd Street, Manhattan, just across the street from the Transogram Company where he worked during the earlier part of the day (95; 100; 73).

On September 10, 1943, Weiss filled in an application for employment as "night supervisor" at Universal Camera Corporation. A notation on such form states he was "to start 9/13/43," under the classification, "Supervisor Trainee." Over Supervisor Norden's signature appears the following remarks as to the rate of pay: "As poten-

tial supervisor 75¢ an hour, 1st month as supervisor 75¢ an hour, then to 87½¢ an hour for 3 months, then to 1.00 an hour" (20).

On September 13, 1943, Weiss commenced work at Universal. Being in training the first couple of weeks, he had to be on the job from about 7 A. M. until 4:45 P. M. (20). Thereafter, he worked on the 3:30 P. M. or 4 P. M. to 12 midnight shift (76).

In a letter dated September 14, 1943, Universal notified the Local Board that Weiss "was employed by us on Monday, September 13, 1943" and "is being trained to become a supervisor in our Binocular Assembly Division" and pointed out, "we are doing critical war work for the Army and Navy" (20; 21).

In a letter dated September 15, 1943, Belmet Products advised the Local Board that Weiss was no longer employed by such corporation, "having left on September 9th." Weiss personally never communicated such fact to his Local Board (73).

In a letter dated September 18, 1943, the Local Board wrote Weiss stating that it "has read and considered the letter from the Universal Camera Corporation and in view of same, continues you in classification 3-A" (21).

In a letter dated November 8, 1943, to the Local Board, Universal enclosed a 42-A form for Weiss, adding that it had "been authorized by Selective Service Headquarters to add his name to our Replacement Schedule" (21).

The 42-A form was sworn to on November 8, 1943, by Weintraub, the personnel manager (21). In such form Universal states that Weiss is "Supervisor of the Sealing Division of the Binocular Assembly Department on the 3:30 P. M. to 12 midnight shift," and that "His duties consist of training the inexperienced female employees assigned to his department, making sure that the proper

quality of work is produced, and making all necessary recommendations that will save time and materials in production." Universal mentioned that Weiss was employed on September 13, 1943, that he worked an average of 50 hours a week and that his average weekly rate of pay was $43.00. Universal declared that "a replacement training program is in operation" and that Weiss "is listed on page 1, line 2, on our Supplemental Replacement Schedule" although it would take "Over six months" to replace him. Universal mentioned that Weiss "has had six and a half years supervisory experience prior to his employment with us" and that "He received an LL.B. degree at New York University." It stated that Universal had "1451" employees and was "engaged in the production of optical elements and the assembly of these optics into the mechanical parts for the complete production of Binoculars for the N. Y. Ordnance Department, U. S. Navy, U. S. Marines and the Canadian Purchasing Commission," adding that "100%" of its products were currently produced "for use in the war effort" (21, 22; 76, 77).

In an affidavit which Weiss submitted to his Local Board about February 4, 1944, he stated that he, the Registrant, "has been employed on a full-time basis by Universal Camera Corp. since Sept. 13, 1943. Registrant has been and still is attorney for Transogram Company, Inc., 200 5th Ave., N. Y. C. in which he receives a bi-weekly salary of $155.00 plus additional legal fees which are paid on a contingent basis depending upon the number and importance of matters handled. Registrant is also part owner of Playwood Plastics Co. Inc., a subsidiary company from which he receives $200 per month. Registrant is required to devote little time to these companies and devotes a full time week to his work in Universal Camera Co." (78-80).

In a letter dated February 22, 1944, to the Local Board, Universal enclosed a "new 42-A form" on behalf of Weiss because "The Third Replacement Schedule has been ap-

proved by New York City Selective Service Headquarters." The new 42-A form was similar in all respects to the earlier 42-A form except that it notes that Weiss "is listed on page 4, line 109, on our Replacement Schedule"; that Universal has "1450" employees; and that Universal is doing work for only "the United States Navy" (22, 23; 82-84).

On March 30, 1944, Weiss was placed in Class 1-A (23). Under Section 622.11 of the Regulations, registrants placed in Class 1-A were "available for military service" and "every registrant who, upon classification, has not been placed in Class 1-C, Class IV-E, Class 1-A-O, or in a deferred class" was to be placed in Class 1-A.

Upon being notified of such change in his classification, Weiss wrote to his Local Board on April 4, 1944, requesting "a hearing at such time as your rules prescribe" (86). He subsequently received a card postmarked April 5, 1944, stating, "you will have a hearing after you pass your physical examination" (23). Weiss was never notified to appear for any physical examination nor was he ever so examined (23).

In a letter dated May 22, 1944, to the Local Board, Universal wrote that it had "been instructed by Selective Service Headquarters to submit a Form 42-B for our employees who are over thirty years of age in accordance with the provisions of Local Board Memorandum #115, as amended May 12, 1944," and added that "We are doing 100% critical war work for the U. S. Navy" (88). Such Form 42-B stated that Weiss' title was "Supervisor of Sealing Division," that his duties were to "Train new employees, supervise all employees, and keep a constant check on quality and quantity of production," and that he was "employed full time" (89).

By the latter part of May, 1944, work at Universal had so greatly slackened that Weiss, who was suffering from

fatigue and loss of weight, asked for a vacation. Norden, the Supervisor, told him that if he obtained a doctor's certificate, Universal would grant him a leave of absence until additional work required his return (96; 100, 101). Weiss thereupon went to Dr. Julius Schoenfeld, his family doctor, who, after an examination, gave him a letter dated June 1, 1944, stating "Mr. Meyer Weiss has been a patient of mine for several years. Recently he has complained of nervousness, loss of weight and fatigue. I have advised that he take a rest at his earliest convenience" (109). Weiss gave such letter to Weintraub, Universal's Personnel Manager, or to Norden, Universal's Production Manager, and was thereupon placed on leave of absence, about June 3, 1944 (96; 101). At such time the petitioner understood from Mr. Norden that he would be called back to work at Universal within two or three weeks or a month, as soon as work under the pending new contracts required; the petitioner neither quit his job nor was he discharged (96). Thereafter he kept in touch with Universal either by telephone or personal visits, and each time was told that the company was not then ready for full-time production but soon expected to be; in perfect good faith he waited (101).

On one of the records from the files of Universal there appears the handwritten notation "leave of absence, ill health, Dr.'s note in file" (92). Such handwritten notation appears under the subheading "Remarks" on a printed form headed "Notice of Termination of Service," dated September 28, 1944. Besides the handwritten notation under "Remarks," the only other handwritten notations on the form are: Weiss' name, department, title and employee number. Although the form contains ample spaces with detailed designations to set forth the reason and cause for an employee's termination of service and although the Instructions on the reverse side of the form require the person filling in such form to indicate one of the enumerated definite causes for the reason of the termination of service,

no such cause or reason has been filled in. Neither were any of the words crossed out in the printed comments: "Individual—would—would not—be a good subject for reemployment in—company—department" and "Individual —to be—not to be—replaced." Further, the Instructions require:

> "When an employee is discharged, or released, or resigns by request, a letter must be sent to the employment office with 'notice of termination of service' explaining the circumstances."

No such letter was sent.

About July 5, 1944, Weiss was reclassified in Class 2-B, a deferred classification, in which classification he still remains (25).

On December 20, 1944, Weiss appeared before Colonel Brady at Selective Service Headquarters, having been requested to appear there (28). On December 26th, a few days after Colonel Brady questioned him about his employment at Universal, Weiss, following Colonel Brady's suggestion, wrote his Local Board (25, 26):

> "I had been on sick leave from Universal Camera Corp. by whom I was employed in the capacity of night production supervisor. Since I have been able to assume work again, the night shift had been dropped as the Navy binocular program had been completed. I was advised by Universal that I would be recalled to work as soon as the new Army program was started on the night shift as I am fully trained to do the work on these binoculars.
>
> "I have again checked with the company and they are unable to give me definite information as to the date when I will be recalled.
>
> "I have been advised to supply my draft board with the above information although my services have not been terminated by Universal Camera Corp."

On February 2, 1945, Weiss was again questioned about his employment at Universal, this time by Special Agents of the Federal Bureau of Investigation (29).

ARGUMENT

ONE

The Court erred in affirming petitioner's conviction where the stipulated and undisputed evidence failed to show that the petitioner had knowingly violated the Selective Service Regulation in question (discussion of question presented 1).

Merely to have failed or neglected to perform a duty required by one of the Selective Service Regulations is not a crime. Section 11 of the Selective Service Act (50 U. S. C. A., App., 311) provides that a person must "knowingly" fail or neglect to perform such a duty. The word "knowingly," as used in this statute, means that a person must have failed or neglected to perform such a duty with criminal intent, in effect, with the deliberate intent to violate the Act or the Regulations, to "dodge the draft." The Act was not intended to make a criminal of a person who, in good faith, failed or neglected to perform such a duty.

This Court in *Bartchy* v. *United States* (1942), 319 U. S. 484, reversed a conviction based upon the same provision of Section 11 of the Act (50 U. S. C. A., App. 311) as the Second Count in this case. However, the duty which the Government alleged the defendant Bartchy had knowingly failed to perform was, unlike the vague one here, a specific duty, to wit, "the duty of each registrant to keep his local board advised at all times of the address where mail will reach him" (Section 641.3 of the Regulations). Bartchy, after he had been placed in Class 1-A by his Local

Board in Texas, after he had passed his final physical examination, and after his Local Board had advised him that his induction would take place within twenty or thirty days, immediately secured employment on a coastwise ship bound for New York. Bartchy wrote his Local Board advising it to address mail to him in care of the National Maritime Union at Houston and arranged there to have his mail forwarded to him in care of the Union's New York office. Within a short time thereafter his Local Board sent him a notice to report for induction, addressing it to the Union's Houston office which forwarded it to the New York office. Bartchy never received such notice because the New York office of the Union returned it to the Local Board. In response to the Government's contention, the Court, at page 489, stated:

> "If this suggestion is meant as a rule of law that at his peril the registrant must at short intervals inquire at his last address given to the board, * * * or at his own forwarding address, * * * we are of the view that the Government demands more than the regulation requires. The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance."

In conclusion, at pages 489 and 490, the Court declared:

> "Petitioner might have been more diligent by telephoning or calling at the union at intervals between the twenty-fifth of February and the tenth of March but we conclude that he was justified in relying upon the efficiency of this experienced organization to advise him of the arrival of the notice."

There is no question that up to the time the petitioner received the Local Board's letter of September 4, 1943, stating that if within thirty days he did not either "transfer to some other position or register with the United

States Employment Service" he would be reclassified to "1A," he had performed every duty required of him under the Act and the Regulations. In fact, he had done more. During April, 1943, he had applied for a commission in the Navy but was rejected because of failure to pass the eye-test; as early as April 14, 1943, long before receiving the Local Board's letter, he had registered with the United States Employment Service and reported there several times; and on August 27, 1943, before such letter was ever sent, he had applied for work at Belmet Products, Inc., Brooklyn, was accepted, and told to commence work there on September 7th, which he did.

The petitioner advised the Local Board that he had started to work at Belmet Products and when he got the job at Universal, which incidentally was just across the street from Transogram where he worked during the morning and early afternoon, he so advised the Local Board. However he never advised the Local Board that he had stopped working for Belmet Products; Belmet Products, the employer, did that. And such notification by the employer, rather than the employee, the Registrant, was in direct compliance with the Instructions contained on the bottom of Selective Service Form 42-A:

> "INSTRUCTIONS: This form is to be filled out by an employer or other person who has knowledge of the registrant's eligibility for Class II deferment as a necessary man in his civilian occupation or activity. *If the registrant is deferred, the employer must notify the Local Board promptly of any change in the registrant's job status, or if his employment is terminated.*" (Italics appear in original instructions.)

In no Regulation or other Instruction was the employee specifically required to advise the Local Board of his termination of employment. And the Local Board never suggested in any way that the petitioner should have advised it of his leaving Belmet Products. Yet Judge MOSCOWITZ in

his opinion states that the petitioner's "familiarity with the requirements of the law is also evidenced in his prompt notification of his Local Board in September, 1943 that he procured employment with a Brooklyn concern engaged in essential war production" (125). That statement merely assumes the law required petitioner to give notice of termination of employment. And Judge Moscowitz does not note that petitioner's notification of employment was in direct response to a letter from the Local Board. How it follows from the fact that petitioner responded to a specific letter of his Local Board that he was fully familiar with the "requirements of the law"—or rather what the Government conceives the "requirements of the law" in this case to be—is not clear. To the contrary, petitioner's experience with Belmet Products would have lulled any normal registrant into the belief that it was solely the duty of the employer to advise the Local Board of his termination of employment, as indeed it was.

After Universal, the employer, had written advising the Local Board that the petitioner was working there doing critical war work, the Local Board wrote the petitioner that, "in view of same," he was being continued in "classification 3A." Such classification had nothing to do with the type of work a registrant was engaged in. Section 622.31 of the Regulations provided that "any registrant who has one or more dependents" "and who is not engaged in a civilian activity which is necessary to war production or which is supporting the war effort" shall be placed in such class. And Section 622.32 defined "dependent," so far as pertinent here, as "the wife or child of the registrant with whom the registrant maintains a *bona fide* family relationship in their home," provided "such status" was "acquired prior to December 8, 1941, and at a time when the registrant's selection was not imminent." The petitioner, because of his family status, had been in Class 3-A since he had been originally classified in March, 1941.

The petitioner worked as a supervisor at Universal eight hours a day on "the 3:30 P. M. to 12 midnight shift." Universal, the employer, filled in and sent to the Local Board Selective Service Form 42-A, advising it of the petitioner's employment there and of the type of work he was doing. Universal sent to the Local Board one such form on November 8, 1943, and later, on February 22, 1944, sent another such form. In the meantime, on February 4, 1944, the petitioner advised the Local Board that he was and had been working at Universal and at Transogram, explaining the details of his work at both corporations. Then, on March 30, 1944, after the petitioner had been working at Universal over six months, the Local Board placed him in Class 1-A.

Yet Judge Moscowitz in his opinion states that the petitioner "originally undertook the employment [at Universal] as a mere subterfuge and for the purpose of avoiding induction" (118); and further in his opinion Judge Moscowitz again emphasizes that the petitioner "procured the job on the night shift of Universal Camera Corporation for the purpose of avoiding the consequences in the Local Board's letter" of September 4, 1943 (123). In view of the facts, such sinister inference seems unfair and baseless. The undisputed evidence shows that after being turned down by the Navy, the petitioner, then a 34-year-old pre-Pearl Harbor father, thought that "the next best thing was to work in a defense plant in order to help the war effort" (101). Long prior to the letter of September 4, 1943, from his Local Board, the petitioner had registered with the United States Employment Service in order to obtain a defense job. Then, entirely on his own and without help from the United States Employment Service (which incidentally never did get him a defense job), he got work at Belmet Products, a plant doing war work. When he learned that he could get similar work at Universal, located on 23rd Street, Manhattan, just across the street from Transogram where he had been working regu-

larly since 1938, he immediately transferred from Belmet Products, located in Brooklyn, and actually commenced work at Universal on September 13, 1943.

The Local Board's September 4th letter specifically directed that the petitioner "must * * * transfer to some other position or register with the United States Employment Service" within 30 days; if he failed to do so, the letter then concluded, "we shall reclassify you to 1A for Induction." It was an invitation, if not a command, to petitioner to transfer to a deferable occupation.

To characterize procuring a job at Universal by the petitioner, after receipt of such letter, as "a mere subterfuge" is a distortion entirely unwarranted by the facts. To declare that procuring a job at Universal by the petitioner was solely "for the purpose of avoiding induction" and "avoiding the consequences of the Local Board's letter," thereby insinuating that such action was sinister and perhaps even illegal, is as unreasonable as to declare that our armed forces were comprised of men who served their country only to avoid going to jail. Far from avoiding the consequences of the Local Board's letter, petitioner complied strictly therewith.

There was no sham about the petitioner's work at Universal. Universal was engaged "100%" in the production of products for use in the war effort, to wit, "the production of optical elements and the assembly of these optics into the mechanical parts * * * of binoculars" for the United States Navy, the United States Marine Corps and the Canadian Purchasing Commission. The petitioner worked there daily on "the 3:30 P. M. to 12 midnight shift." True, he continued to work at Transogram during the morning and early afternoon hours but he never made any secret of this. The petitioner's Local Board was always aware that he worked on the afternoon to midnight shift at Universal, and he advised the Local Board that he "has been and still is attorney for Transogram" receiving "a

bi-weekly salary of $155.00 plus additional legal fees which are paid on a contingent basis depending upon the number and importance of matters handled" (79).

Neither was there any sham about his leave of absence from Universal. During the entire time the petitioner was actively working at Universal, the corporation was devoting its entire efforts to completing work under Navy contracts. During May, 1944, work under the last of these contracts neared completion and "the work on the [petitioner's] night shift was petering out" (96). It was not until the work at Universal slackened to such an extent that there was practically nothing for the petitioner to do that he asked for a vacation. At such time Universal was negotiating wtih Government authorities for further contracts under which it would manufacture binoculars but such negotiations had not yet been completed. The petitioner asked Mr. Norden of Universal for a vacation; Norden agreed to give him a leave of absence but only upon the understanding that the petitioner would return as soon as Universal was ready to go back on a full-time production schedule. Norden also told the petitioner that he would have to file with Universal a doctor's certificate. The petitioner thereupon went to Dr. Julius Schoenfeld, his family physician, who after examination gave him a letter dated June 1, 1944, stating: "Mr. Meyer Weiss has been a patient of mine for several years. Recently he has complained of nervousness, loss of weight and fatigue. I have advised that he take a rest at his earliest convenience." The petitioner then gave such letter either to Mr. Norden or to Mr. Weintraub, Universal's Personnel Manager. Within a few days he was given a leave of absence and told that he would be called back to work within two or three weeks or a month, or as soon as Universal was ready to commence work under the new contemplated Army contracts.

In his opinion Judge Moscowitz states that the petitioner "pretends to have been suffering ill health" (125),

that the petitioner was given his leave of absence from Universal "because of his alleged ill health" (124), and that "serious doubt enshrouds the defendant's claim of ill health" (125). At the time there wasn't enough work at Universal to keep him busy and he wanted a vacation only while work was slack and until it picked up to full-time employment. Universal gave him the leave of absence because of such temporary stoppage and intended such leave to be only until full production was started on the contemplated Army contracts. The petitioner went to his doctor only because Universal insisted upon having a doctor's letter in its files before granting the leave of absence. Neither the petitioner nor Universal ever made any claim to the Local Board that the petitioner was too ill to work or to be inducted into the armed forces. The petitioner feigned no illness; the doctor's letter merely set forth the undisputed facts that the petitioner was fatigued and needed a rest. At about the same time that the petitioner was given a leave of absence at Universal he was also given a five weeks' vacation by Transogram where he was "advisory counsel and acted in other capacities" and by Plywood Plastics Corporation, a subsidiary of Transogram, of which he was "treasurer, * * * supervising all activities of the company, including purchasing, sales and production" (101).

The petitioner never quit his job at Universal and Universal never fired him. During the period in question he fully expected to be called back. In fact, when he returned from his vacation to Transogram and Plywood, he himself kept in touch with Universal either by telephone or personal visits, and each time was told that the company was not yet ready for full time production but soon expected to be, that he would soon be called back. In perfect good faith he waited. The Circuit Court was wrong in stating that "Though failure to report a short leave of absence could well have been due to his belief that he would soon be at work again, that excuse could hardly within reason

continue as month succeeded month without the occurrence of anything, so far as this record shows, to justify him in retaining that belief" (136). The Record (101) shows that while on the leave of absence the petitioner telephoned Universal many times during August, September, October and November, 1944, inquiring when he could return to work.

The first inkling the petitioner got that anything might be wrong was when he appeared before Colonel Brady of Selective Service Headquarters on December 20, 1944. There he realized, for the first time because of the questioning of Colonel Brady, that he had better advise his Local Board concerning his status with Universal. Indeed in the very letter he sent his Local Board, a few days thereafter, on December 26th, the petitioner stated that he had "been advised to supply my draft board with the above information although my services have not been terminated by Universal Camera Corp." Yet Judge Moscowitz states that the petitioner's "bad faith is reflected in the fact that this letter was written after the investigation had been commenced which lead to this prosecution and defendant had already been interrogated with respect thereto" (124; 125). The trial Court inferred from such prompt compliance with Colonel Brady's suggestion, not that the petitioner was in good faith trying to comply in every way with Selective Service, but that the petitioner always knew, even before Colonel Brady's suggestion, that he should have written such a letter to the Local Board. Neither the circumstances under which such letter was written nor any other facts in the case warrant any such inference.

Although it is easy to say more than two years later, as Judge Moscowitz said and as the Circuit Court intimated, that "continued absence from war work for a month or two without notifying his draft board, and certainly, as here, for six months convincingly indicates that he was in bad faith failing to perform a duty required of him" (124), yet the petitioner, at the time, had no way of knowing that

such leave of absence was anything more than a temporary one, one of "a week or two or a month." And even during such time, when his leave of absence stretched longer and longer, he was being told by Universal that he would be called back to active work. If indeed his employment at Universal had terminated or even if his status there had changed, unknown to him, the petitioner had every reason to rely upon Universal so advising the Local Board. For, if such were the fact, Universal, the employer, and not the petitioner, the employee, had the specific duty to so advise the Local Board (77; 84).

Further, the petitioner had and could have no unlawful motive in failing to report his leave of absence, since at the time, under the then-existing draft policies, he was entitled to a deferred classification irrespective of his employment by Universal.

Thus the evidence is not only as consistent with innocence as with guilt, but it fails signally to show any wilful or criminal intent to violate the Act or the Regulations. In disclosing the petitioner's entire relations with his Local Board, the evidence conclusively demonstrates that he conscientiously and scrupulously complied with every requirement and duty imposed upon him by the Act and the Regulations.

To hold that the petitioner, a lawyer, "may be presumed to have been possessed of more than the common intelligence under which standard men are held accountable for their illegal conduct" (123), and to hold, therefore, that he knowingly failed to perform a duty, which at best is vaguely described, in that he failed to advise his Local Board that his employment at Universal had terminated, a fact which was never proved, is to strain unreasonably for an inference of guilt where every fair inference leads only to innocence, and the Circuit Court of Appeals should have reversed the judgment of connection.

TWO

The Court erred in affirming petitioner's conviction where the stipulated and undisputed evidence established that there was no termination of employment as alleged (discussion of question presented 2).

The Second Count of the Indictment specifically charges that the fact which might have resulted in the petitioner being placed in a different classification was that he "was not from June 3, 1944, to December 31, 1944, employed by Universal Camera Corporation, and that the employment of said Meyer Weiss had terminated on or about June 3, 1944."

It was therefore incumbent upon the Government to prove beyond a reasonable doubt that the petitioner's employment at Universal had so terminated.

Neither the evidence nor the law supports any such conclusion.

Nowhere in his opinion does Judge Moscowitz directly hold that the petitioner's employment at Universal had terminated at any time between June 3 and December 31, 1944. Judge Moscowitz does set forth the proposition that "A registrant who wilfully, knowingly and deliberately failed to disclose to the Local Board that the essential employment had terminated which he had taken especially to procure a deferment from service in the armed forces and solely upon the basis of which he had been granted such deferment, is guilty of evading service, which the statute makes a crime" (122). The opinion of the Circuit Court entirely avoids this point.

And Judge Moscowitz even compares the case of *Stassi* v. *United States* (C. C. A. 5th, 1945), 152 F. (2d) 581, cert. and rehearing denied, 326 U. S. , 90 L. Ed. 942, 1269,

with the instant one, saying that in the *Stassi* case "the facts were stronger for the defendant, since he was only 'chronically absent' during a five months' period from the employment on the basis of which he had received a deferred classification, whereas here the defendant never returned at all during the six months covered by the indictment nor thereafter" (121, 122). In the *Stassi* case, the evidence established that a shipbuilding company certified to Stassi's Local Board that Stassi "was a full time, regularly employed workman averaging 48 hours work per week" at such company during the period July through November, 1943, whereas Stassi had "worked only 11 days in the month of July, 1943, no days during the months of August, September and October, 1943, 10 days in the month of November, 1943." Stassi in effect just wantonly absented himself from work and that fact was specifically misrepresented to the Local Board.

There is *no misrepresentation involved in this case.* The evidence here establishes that from September 13, 1943, with the exception of the first couple of weeks when he worked from 7 A. M. to 4:45 P. M. weekdays, the petitioner worked on the 3:30 P. M. or 4 P. M. to midnight shift regularly until about June 3, 1944, and that he received pay therefor. Without question the petitioner was given at such time a leave of absence by Universal. However, he did not resign, and he was not released, discharged or laid off. He had never been chronically absent. And while the Government introduced into evidence a Universal form bearing the printed heading "Notice of Termination of Service," the handwritten notation on such form explicitly states that the petitioner was on "leave of absence." The printed heading becomes meaningless when the document as a whole is examined. In addition to the handwritten notation under the subheading "Remarks," nothing save the petitioner's name, department, title and number has been filled in. Although the form contains ample spaces with detailed desig-

nations to set forth the reason and cause for an employee's termination of service and although the Instructions on the form require the person filling in such form to indicate one of the enumerated definite causes or reasons for the termination of service, no such reason or cause is in any way indicated. Further, the form bears the printed notation "Individual—would—would not—be a good subject for re-employment in—company—department" and the printed notation "Individual—to be—not to be—replaced," without any of the words having been crossed out, as obviously would be required for a termination of service. And further, the letter required by the Instructions when an employee "is discharged, or released, or resigns by request" was never written. The fact is that the petitioner remained on the records of Universal as an employee, fully expected to be called back when Universal had work available, and kept in touch with Universal to learn when work would be available.

Although Judge Moscowitz in his opinion states that the petitioner "claims he was given a 'leave of absence'" (124), earlier in describing the "leave of absence" notation, Judge Moscowitz concedes that "the Court cannot assume that the paper has been tampered with" (115). The fact is indisputable that the petitioner had been given a bona fide leave of absence until the then contemplated resumption of work by Universal required his return.

Thus, in the light of the evidence, the Government not only failed to prove beyond a reasonable doubt that the petitioner's employment with Universal terminated but it failed to furnish enough proof to establish by even a preponderance of evidence, as required in a civil case, that there was such a termination of employment.

In a case concerning a group insurance policy, *Grove* v. *Equitable Life Assur. Soc.* (Sup. Ct., Pa., 1939), 9 A. (2d) 723, 725, the Court stated:

> --- * * and the words 'leave of absence' we believe are the equivalent of the words 'the deceased was granted a vacation.' If that were not so and if deceased did not still have a connection with the plant it would not have been necessary to have written on his employee's card that there was a continuation of his leave of absence."

In another group insurance policy case, *Ambrose* v. *Metropolitan Life Ins. Co.* (Sup. Ct., N. J., 1939), 10 A. (2d) 479, the Court held that mere cessation of active service does not mean a termination of employment. At page 480 the Court stated:

> "In the policy there are such phrases as: 'termination of employment'; 'ceased to be in its employ'; 'left said employment'; and 'while the employee is in the employ of the employer.' An examination of the policy evinces that these phrases refer to the existence of the relationship of employer and employee and to the status or position of the deceased in that regard at the time of his death. The word 'employment' is intended to indicate the status of the holder of the certificate in relation to his employer. The phrase 'termination of employment' assuredly does not mean the mere cessation of active service. * * * An employee might only work one or more days in a fortnight and still continue to be in the employ of the company."

In *People ex rel. Davie* v. *Lynch* (3rd Dept., 1914), 164 App. Div. 517, the Court held that a Civil Service employee who was on "an indefinite leave of absence without pay" was not "separated from the service." The Court at pages 520 and 521 pointed out:

> "The woman was not dismissed, she did not resign, her appointment was not cancelled, and she did not die; therefore, she was not separated from the service. The definition in the Civil Service Rules must follow the definition in the law itself, for this is the command of the law. * * * The expression 'separation from service' or the expression 'separated from

> the service' has, therefore, the same meaning in the rules that it has in the law. In the rules the meaning of the words is in no degree unlike their meaning in the statute; it is no broader, no narrower, no different.
>
> "• • • As soon as her health returned it became her duty to return to the service. And she did so; that is, indicated a desire at least to do so. If there were no limitation or interpretation in the statute, the words 'separation from service' could never be held to include a leave of absence from the service."

The petitioner contends that, instead of proving that his employment at Universal had terminated as alleged in the Indictment, the facts actually established that there was no such termination of employment. Certainly, the employee-employer relationship must necessarily continue while an employee is on leave of absence and it is a self-contradiction to assert that a leave of absence is tantamount to a termination of employment.

Judge Moscowitz during the trial had remarked that the evidence showed "a leave of absence" and that "a man may be employed by a concern and have a leave of absence for six months or a year, and still be employed by that concern" (35) and that "If you are on leave your services have not been terminated, if you take a vacation you are still employed, aren't you? (34).

Hence, the Government having failed to prove such essential allegation, the judgment of conviction should have been reversed by the Circuit Court of Appeals.

THREE

The Court erred in affirming petitioner's conviction where the stipulated and undisputed evidence indicated that the petitioner did not fail to perform any duty required of him, no fact which might have affected his classification having occurred (discussion of question presented 3).

Not only did the petitioner not knowingly fail and neglect to advise his Local Board of a fact that might result in his being placed in a different classification, but no such fact existed.

The Government based this prosecution upon the theory that the petitioner knowingly failed and neglected to report to his Local Board a fact that might result in his being placed in a different classification, to wit, the alleged fact that he was not from June 3, to December 31, 1944, employed by Universal and that his employment there had terminated about June 3, 1944.

No evidence was offered to show that it would have in any way affected the petitioner's classification if he had advised his Local Board that from June 3, 1944, to December 31, 1944, he was on a leave of absence from Universal and that during such time he received no pay from such corporation, or that his employment had terminated on June 3, 1944, assuming that it had. And no such evidence was possible. For the fact is that at such time his classification would not have been thereby affected one way or the other.

On June 3, 1944, the petitioner was thirty-three years old and lived with and supported his wife and pre-Pearl Harbor child. During the day he worked for Transogram Company, Inc., manufacturer of toys and games, where he had worked since 1938 and where he still continues to work.

At such time, June 3, 1944, the petitioner was in Class 1-A in which classification he had been placed on March 30, 1944, after he had been working several months on the night shift at Universal. More than a month after June 3rd, to wit, about July 5th, his classification was changed to Class 2-B.

The reason for such change of classification had nothing to do with petitioner's employment by Universal. The petitioner would have been given a deferred classification at such time even if he were employed only by Transogram. The actual directions issued in Bulletins to the Local Boards by Colonel McDermott, Director of New York City Headquarters of Selective Service (of which Bulletins the lower Court took judicial notice), show such to be the fact. Summaries of such Bulletins appeared in the New York newspapers throughout the period.*

On May 12, 1944, Local Board Memorandum No. 115 was so amended as to make "many sweeping changes" in the policies of the Director of Selective Service with respect to the classification and deferment of men who had passed their twenty-sixth birthday.

In clarifying such amended Memorandum, Colonel McDermott pointed out in Bulletin No. 116, issued on May 17, 1944:

> "It has been clearly indicated that the Army and the Navy do not want men over 26 years of age for the time being, and that in all probability they will neither need nor desire men over 29 years of age for an indefinite period.
>
> "On the basis of the conditions locally existing in New York City, we should give priority to the classification, reclassification, and induction of men under 26 years of age. * * *"

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* For example: New York Times of April 9, April 11, April 12, April 18, May 13, September 9, 1944.

Then referring to registrants in the appellant's age group, thirty through thirty-seven, Colonel McDermott continued:

> "Men in this age group may and should be granted occupational deferments if they are 'regularly engaged' in activities in support of the national health, safety or interest.
>
> "It is not required that they be 'necessary men.' The importance or lack of importance of their jobs is immaterial. Their skill or experience or their lack of skill or experience is immaterial. It is sufficient that they be 'regularly engaged' in such an activity, regardless of the nature of the positions they occupy.
>
> "• • •
>
> "Local Boards should not deny occupational deferments to men in the 30 through 37 age group merely because they are engaged in occupations included in the old list of Nondeferrable Activities. That list has no bearing whatever on the new policy with respect to occupational deferments of men in this age group. The nature of *the activity*, not the nature of the job, is the determining factor." (Italics Colonel McDermott's.)

Colonel McDermott then described what activities are in support of the national health, safety or interest:

> "Under this broad and liberalized definition it would seem that any man who has reached his thirtieth birthday may be granted an occupational deferment if he is filling a useful job in an activity reasonably necessary for the legitimate needs of the community. This naturally would cover an infinite variety of activities and services. It would seem to include all but those activities and services which are to be regarded as unwarranted luxuries or as completely unnecessary and unessential."

As to reclassification Colonel McDermott said:

> "Part IV of Local Board Memorandum 115 points out that many men who have passed their thirtieth birthday and who were formerly properly classi-

fied in I-A under previous policies will now qualify for deferment in Class II-A or II-B under the newly adopted policies.

"The Memorandum *directs* that the classifications of all registrants in the 30 through 37 age group shall be reviewed, and that the Local Boards shall classify anew any registrant in this age group who is found to be 'regularly engaged' in an activity in war production or in support of the national health, safety, or interest." (Italics Colonel McDermott's.)

Later in Bulletin No. 121, issued August 3, 1944, Colonel McDermott pointed out:

"The Army and the Navy have made it plain that they simply do not want men over 26 years of age if the calls can be filled with men under that age. This being so, and in the light of the foregoing, there is no necessity for the New York City Local Boards to apply a rigid interpretation of the requirements for occupational deferments under the liberalized provisions of Local Board Memorandum No. 115, particularly in the case of men over 30 years of age.

* * * * * * *

"If the Local Boards do not vigilantly review the cases of the I-A registrants in the 26 through 37 age group, it will result in our forwarding men in the higher age brackets whom the Army and Navy do not want, despite the fact that there may be an ample reserve of men with higher order numbers under 26 years of age."

As to registrants in the appellant's age group, thirty through thirty-seven, Colonel McDermott said:

"So far as the men over 30 are concerned, it cannot be stated too emphatically that if they are regularly engaged in activities in support of the national, health, safety, or interest, *the nature of the particular job they happen to hold in such an activity is utterly immaterial.* It makes no difference whether the registrant is the executive manager, or a humble file

clerk, or a watchman, or a messenger, or anything else. If the man's employer is engaged in an activity in support of the national health, safety, and interest, he may properly be granted an occupational deferment, regardless of the kind of work the man himself does.

"As to what constitutes 'an activity in support of the national health, safety, and interest,' reference is made to Part V of New York City Bulletin No. 116. That Bulletin is based on local conditions. There is no acute shortage of unskilled or semi-skilled workers in war production plants in New York City. Here again it cannot be stressed too emphatically that activities in support of the national health, safety, or interest, are not limited to war production activities. As stated in the Bulletin, the term would seem to comprise any and all activities 'reasonably necessary for the legitimate needs of the community.'" (Italics Colonel McDermott's.)

On September 25, 1944, Colonel McDermott issued Bulletin No. 124 in which he set forth in full a letter from him to the chairman of one of the Local Boards, mentioning that he had submitted a copy of such letter to National Headquarters which had advised him that "on the basis of local conditions in New York City, it is not in any way subject to criticism." In part such letter reads:

"First of all, I believe this Memorandum should be interpreted by each State Director in the light of the local conditions existing in his jurisdiction. Here in New York City we have a pool of I-A registrants under 26 years of age which apparently will be sufficient to enable us to meet our calls with men in this age group for months to come. The number of newly arrived 18 year old registrants each month has been running approximately the same as the amount of our city wide calls. If by any chance we should have an unexpected increase in our calls, I am pretty well convinced that the pool of I-A men in the 26 to 29 age group would be more than sufficient to take care of any such unexpected increase. As I have said so

many times, the Army and Navy simply do not want men over 30. They have come to regard them as a liability rather than an asset, and, this being so, I think we can afford to be extremely liberal in deferring men over 30 years of age rather than force the Army and Navy to take men they do not want and do not need.

"Also, on the question of local conditions there is this further consideration. In New York City we have no really acute shortage of semi-skilled or unskilled workers in our industrial and war production plants. It would therefore seem to serve no useful purpose to force a man over 30, with perhaps a wife and one or more children, and who has no mechanical skill or experience, into an industrial plant as an unskilled worker. The plants have no great need for such men, the interests of the community certainly would not be promoted by such a policy, and in most cases it might well entail a considerable sacrifice, financial or otherwise, to the individual concerned as well as to his wife and children.

"There are certain areas in the country where an acute shortage of even semi-skilled and unskilled workers does exist. In those jurisdictions some of the State Directors have accordingly placed a much stricter interpretation upon Local Board Memorandum No. 115 in the hope of bringing pressure upon semi-skilled and unskilled workers to enter the war production plants where they are so badly needed. If I were in their place, I would probably adopt the same policy. Inasmuch as such conditions do not exist in New York City, however, I believe that such a policy would be entirely unwarranted here.

"On the basis of local conditions in New York City and the fact that the Army and Navy have emphatically indicated that they do not want men over 30, I believe every man in New York City over that age should be deferred if he is steadily employed in an activity which supplies the reasonable needs and conveniences of the community. It is true that many of these activities provide us with commodities and services without which we could well manage to sur-

vive, but I think that if they are of a useful, customary, legitimate, and reasonable nature, they should warrant a deferment.

"In going over your list, I would say that practically all of the men listed are engaged in activities which may be reasonably regarded as serving the legitimate needs and conveniences of the community, with the possible exception of the man who operates a stamp collectors' shop. Some people might regard this is an unwarranted luxury and a completely unnecessary activity, but even in his case I would not criticize a Local Board for classifying him in II-A, if, in their judgment, they think he should be deferred. As to the others, however, we certainly must have furniture stores and men's furnishing stores and cigar stores, etc., and I am sure that your wife and mine would both agree they certainly could not get along if the millinery and ladies' garment people were to close up.

"As a matter of interest, we recently had a Presidential Appeal in the case of the head buyer of oriental rugs of a very prominent furniture house in New York City, who was 34 years old and had two pre-Pearl Harbor children. His out of town Local Board classified him in I-A, but the New York City Board of Appeal, following my policies, reclassified him in II-A. The State Director having jurisdiction over his Local Board thereupon took an Appeal to the President from the II-A classification. On the Appeal, the II-A was affirmed.

"Another decision which came in a few days ago on a Presidential Appeal involved a 32 year old registrant who was the Assistant Manager of the Mortgage Servicing Department of a small New York City trust company. The New York City Board of Appeal classified him in I-A and I took an Appeal to the President, upon the ground that the servicing of mortgages could reasonably be regarded as a locally needed activity. On the Presidential Appeal the I-A classification was reversed and the registrant reclassified in II-A. These two cases are typical of several others, in which II-A classifications of men

> over 30 have been granted or affirmed on Presidential Appeals."

Again in Bulletin No. 126, issued November 6, 1944, Colonel McDermott stressed the classification policy of registrants in the thirty to thirty-seven age group, the petitioner's age group:

> "In view of the very liberal policies which have been recommended by this Headquarters from time to time with respect to the classification of men in this age group, these figures seem unduly high. The large number of I-A classifications may be due to the fact that some of the Local Boards have not yet completed reviewing the classifications of these men in the light of the recommendations issued by this Headquarters over the past several months. Attention is particularly invited to New York City Bulletin No. 124. It is accordingly urged that all local Boards once more review the files of all I-A registrants who have passed their thirtieth birthday and that all of those who are *regularly* engaged in activities which supply the reasonable needs and conveniences of the community be seriously considered for classification in II-A or II-B." (Italics Colonel McDermott's.)

Colonel McDermott also stated:

> "Effective immediately, no Local Boards will issue an Order to Report for Induction to any registrant whether father or non-father, who has passed his 30th birthday (except volunteers and delinquents) without first submitting the file to this headquarters for review."

Such enunciated policy during the period in question, June 3 to December 31, 1944, clearly establishes that the petitioner's classification was not dependent on whether or not he was on a leave of absence from Universal or even whether or not his employment at Universal had terminated. During all of such period the petitioner was also employed

by Transogram Company, Inc. where he had been steadily engaged since 1938. While a manufacturer of toys and games, such as Transogram, provides us with a commodity and service "without which we could well manage to survive," yet nevertheless it is engaged in one of those activities which is "of a useful, customary, legitimate, and reasonable nature." We can be just as sure that our children could not get along without toys and games as we can that our wives "could not get along if the millinery and ladies' garment people were to close up." The manufacture of toys and games served "the legitimate needs and conveniences of the community" equally as much as the selling of "oriental rugs" and of cigars, cigarettes, candy, and quite probably as much as the vending of "men's furnishings." It follows that the petitioner, so long as he was gainfully employed, even if only by Transogram, would have been placed in a deferred classification.

The fact that the petitioner has been continued in Class 2-B up to the present, despite his written advice to his Local Board dated December 26, 1944, conclusively supports such contention.

It is in fact conclusively established that petitioner was not classified in Class 2-B because he was employed by Universal. For more than six months after his Local Board was informed that petitioner was employed by Universal, he was retained in Class 3-A, a classification that had nothing to do with his employment. Petitioner was reclassified to Class 2-B in July, 1944, after and pursuant to the enunciation in May of the new liberalized policies which based reclassification not on employment in war production but merely on gainful employment.

This has a vital bearing on the question of "criminal intent" in petitioner's failing to report his leave of absence. At the time he took his leave of absence, the new policies were in effect. His employer had been notified of that fact (88) and every literate registrant in the New York area

was also aware of such policies from a reading of the public press. Since his reporting of that fact would not have affected his right to reclassification under the new liberalized draft policies, there can be no presumption (as there was certainly no proof) that his failure to report his leave of absence was with intent to dodge the draft.

No fact having occurred that might have resulted in the petitioner being placed in a different classification, he was under no duty to report irrelevant and immaterial happenings to his Local Board. Hence, he did not fail to perform any duty required of him under the Act or the Regulations, and the judgment of conviction should have been reversed by the Circuit Court of Appeals.

FOUR

The Court erred in affirming petitioner's conviction based on a Regulation too vague, indefinite and uncertain to impose the duty in question and not intended to impose such duty (discussion of question presented 4).

The petitioner had no duty to advise his Local Board that he was not employed by Universal Camera Corporation and that his employment there had terminated, even if such were the fact.

Section 11 of the Act (50 U. S. C. A., App., 311), makes it a felony for "any person" to "knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act."

It is thus vital to determine whether or not the Act or Rules or Regulations imposed any duty upon an employee in the petitioner's position to advise his Local Board of any termination of employment.

The only duty imposed upon the petitioner by the Act was to register. Section 2 of the Act (50 U. S. C. A., App., 302), imposed such a duty upon "every male citizen of the United States * * * between the age of eighteen and sixty-five." And the defendant did, as required, register with his Local Board on October 16, 1940.

There were no Rules which imposed any duty upon registrants such as the petitioner.

The Regulations, however, did impose further duties upon registrants. Under the Regulations, every registrant was required to "have a Registration Certificate * * * in his personal possession at all times" (Section 617.1); "complete the Selective Service Occupational Questionnaire * * * and return it to his Local Board within 10 days from the date it is mailed to him" (Section 621.12); "appear before the examining physician and submit to a physical examination," "on the day and at the time and place fixed in the Notice to Registrant to appear for physical examination" (Section 623.31(b)); "have in his possession at all times, in addition to his Registration Certificate * * *, a valid Notice of Classification * * * issued to him showing his current classification" (Section 623.61-1); and to "keep his Local Board advised at all times of the address where mail will reach him" (Section 641.3).

There having been no specific duty imposed upon a registrant to report to his Local Board any termination of employment, the Government relied upon the broad language of Section 626.1(b) of the Regulations. Section 626.1(b), as it was during the period in question, read:

> "Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification."

Although Judge Moscowitz held that "the language of Regulation 626.1(b) is not so vague and indefinite that no

standard of guilt is furnished to persons of integrity interested in obeying it" (122) and the Circuit Court of Appeals, following its decision in *United States* v. *Wain*, F. (2d) (dec'd June 11, 1947) held the regulation was valid (135), the petitioner contends that the terms of such section are too vague, indefinite and uncertain to be so construed as to impose a criminal liability upon him for failing to comply with what some prosecutor contends is a duty incorporated in its questionable scope. To give such section the force of a criminal statute deprives the petitioner of "liberty and property without due process of law" and deprives him of "the right to be informed of the nature and cause of the accusation," in contravention of his constitutional guaranties under the Fifth and Sixth Amendments.

The very language of the Regulation in question, "any fact that might result in such registrant being placed in a different classification," is fraught with speculation and requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

The only certainty about this Regulation is that the registrant has no duty to report to his Local Board just any fact. But exactly what facts the Director of Selective Service had in mind when framing the Regulation are unascertainable and require the broadest speculation. Thus, under the most basic principles of criminal law, the Regulation is unenforceable as a penal statute.

In his opinion Judge Moscowitz states that "Although it existed during two wars, it is significant that not until last year was Regulation 626.1(b) or its predecessor ever challenged" (121). True, a Regulation similar for practical purposes to the Regulation in question was in effect during the first World War. But no prosecution was ever based upon a violation of the earlier Regulation, and until 1945 no prosecution was ever based upon an al-

leged violation of the present Regulation. Every other prosecution was based solely upon the alleged violation of some specific duty under the Act or the Regulations.

In this case, the petitioner, a pre-Pearl Harbor husband and father, was originally classified 3-A. He was kept in such classification until approximately six months after he had been working at the Universal Camera Corporation. This, despite the fact that as early as September 14, 1943, Universal advised his Local Board that he was engaged in critical work for the armed forces, and despite the fact that on November 8, 1943, Universal advised his Local Board that it had been authorized by Selective Service Headquarters to add his name to its Replacement Schedule and again on February 22, 1944, similarly advised his Local Board. Even then the petitioner was not placed in Class 2-B, "a registrant found to be a 'necessary man' in any industry, business, employment, * * * the maintenance of which is necessary to the war production program." Instead, on March 30, 1944, before he received his leave of absence, he was placed in a different classification, to wit, 1-A, "available for military service." It was not until July 5, 1944, after the new liberalized draft policies were in effect, that he was classified 2-B, in which classification he still remains, in spite of the fact that his Local Board knows he no longer works for Universal.

In the light of such facts, it is apparent that the petitioner, or any other registrant, could not possibly determine what fact caused or might cause his Local Board to place him in a different classification and therefore what fact he should report to his Local Board under the terms of such Regulation. The very actions of his Local Board in this case clearly demonstrates the uncertainty of the phrase, "facts which might result in such a registrant being placed in a different classification."

Another example of the indefiniteness of the Regulation and its utter impracticality as a penal provision can also

be based on the concrete evidence in this case. At the time the petitioner was given his leave of absence he was in Class 1-A. The Regulation says that each registrant shall "within 10 days after it occurs" report to his Local Board "any fact which might result" in his being reclassified. There was nothing for him to report at such time or within ten days thereafter: he was in Class 1-A at the time of his leave of absence and remained in such class for more than a month after he was granted the leave of absence. Consequently, there was nothing for him to report. And when he was subsequently placed in Class 2-B, on July 5, 1944, there was no fact which might result in his being placed in a different classification which occurred thereafter or, indeed, from the time he had been employed by Universal. The Local Board, even after being notified by the petitioner in his letter dated December 26, 1944 (91), did not deem the facts therein set forth to have any bearing upon his classification for it did not change his classification but continued him in Class 2-B.

This Court in *Connally* v. *General Construction Co.* (1925), 269 U. S. 385, 391, held an Oklahoma penal statute unconstitutional because of its vague provisions. In writing the opinion Mr. Justice SUTHERLAND laid down the basic principle applicable:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law, * * *."

The fact that the prosecutor has specified a particular act as coming within the terms of the Regulation in no way

validates it as a criminal provision. Mr. Justice BUTLER in *Lanzetta* v. *New Jersey* (1939), 306 U. S. 451, 453, where this Court held a New Jersey penal statute void because it was repugnant to the due process clause of the Fourteenth Amendment, stated:

> "If on its face that challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. * * * It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

See also: *United States* v. *Cohen Grocery Co.* (1921), 225 U. S. 81, 89; *Weeds* v. *United States* (1921), 255 U. S. 109; *Herndon* v. *Lowry* (1937), 301 U. S. 242, 262-3.

Furthermore, there is no basis upon which to contend that the Director in drafting Section 626.1(b) intended thereby to impose a duty upon each registrant to advise his Local Board of any termination of employment. The duty is placed squarely on "the employer." It would have been simple for the Director, if he so intended, to place such a duty upon registrants in specific language. A glance at the Instructions on the bottom of Form 42-A (77, 84) indicates the simplicity with which it could have been done, if the Director had so desired. In part such Instructions read:

> "*If the registrant is deferred, the employer must notify the Local Board of any change in the registrant's job status, or if his employment is terminated.*" (Italics the Director's.)

If the Director had any intention to impose a similar duty upon the registrant also, he merely had to add, just before or after "the employer," the necessary connective with

the words "the registrant." Or, if he so intended, the Director could easily have added one more Regulation to the myriad Regulations he effected imposing in similar specific language a like duty upon registrants.

But the Director did not do so. And there is no reason to believe that he intended to impose any such duty upon registrants. In considering Class 2-B registrants, the Local Boards did not deal directly with the registrants. Instead they had to do directly with the registrants' employers. It was the employers, not the registrants, under the Regulations, who wrote out and swore to and filed with the Local Boards all the necessary documents. It is altogether consistent with the Director's policies, therefore, that the employers, and not the registrants, were placed under the specific duty of advising the Local Boards of any termination of employment of such registrants. And it follows, in view of such policies and in view of the Regulation requiring the employer to so advise the Local Board (for under the terms of Section 605.51 such Instruction had the same force and effect as a Regulation) that the Director saw no purpose in requiring the registrant as well as the employer to so notify the Local Board.

While Judge Moscowitz in his opinion states that the "Defendant's familiarity with the requirements of the law is also evidenced in his prompt notification of his Local Board in September, 1943, that he had procured employment with a Brooklyn concern engaged in essential war production" (125), the reasonable inference to be gathered from the facts concerning the petitioner leaving the Brooklyn concern, Belmet Products, is that he had no duty to report to his Local Board any termination of employment. True, he advised his Local Board that he had obtained employment at Belmet Products but he never, during September, 1943, or at any time thereafter, advised the Local Board that his employment there had terminated. Belmet Products, as it was specifically required to do under said

Instructions on Form 42-A, so advised the Local Board (73), and such notification completely satisfied the Local Board, for it never in any way suggested that the petitioner should have so notified it. Because of such facts it seems highly unreasonable to infer that the petitioner subsequently in 1944 knew that he, and not his employer, Universal, should report any termination of employment. Indeed, from all the facts in this case, it appears that there would not have been any prosecution of the petitioner and any prosecutor's strained interpretation of Section 626.1(b) of the Regulations had Universal not failed or neglected to notify the Local Board of any change of the petitioner's job status or termination of employment, which it was specifically required to do if any change took place.

Because there was no specific duty imposed upon him to advise his Local Board of any termination of employment, the petitioner did not fail or neglect to perform any duty required of him under the Act or Rules or Regulations and, therefore, the judgment of conviction should have been reversed by the Circuit Court of Appeals.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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and
Francis J. Quillinan,
Attorneys for Petitioner.

INDEX

CITATIONS

757027—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 220

MEYER WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 112–125) is reported at 65 F. Supp. 566. The opinion of the circuit court of appeals (R. 133–135) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 23, 1947 (R. 136). The petition for a writ of certiorari was filed July 21, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the finding that petitioner knowingly violated a selective service regulation by refraining from advising his draft board that he was no longer engaged in war production work, on the basis of which he had obtained a class II–B deferment.

2. Whether petitioner was justified in failing so to advise his draft board on the ground that, due to a liberalized selective service policy in regard to occupational deferments, he might not have been drafted in any event.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894 (50 U. S. C. App. 311), provides in pertinent part:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

The applicable Selective Service Regulations provided as follows during the period involved in this case (June 3, 1944 to December 31, 1944):

§ 622.21. *Class II–A: Man supporting the national health, safety, or interest.* * * *

* * * * *

(c) In Class II–A shall be placed any registrant age 30 through age 37 or age 38 through 44 who is found to be "regularly engaged in" an activity in support of the national health, safety, or interest. (9 F. R. 5200.)[1]

§ 622.22. *Class II–B: Man in war production.* * * *

* * * * *

(c) In Class II–B shall be placed any registrant age 30 through 37 or age 38 through 44 who is found to be "regularly engaged" in an activity in war production. (9 F. R. 5201.)[2]

§ 622.23. *General rules for classification in Class II–A and Class II–B.*—(a) On the local board is placed the primary responsibility of deciding which men should be given occupational deferments. (8 F. R. 11346.)

* * * * *

§ 626.1 *Classification not permanent.*—(a) No classification is permanent. * * *

(b) Each classified registrant shall, within 10 days after it occurs, * * * re-

[1] The words "or age 38 through 44" were eliminated by an amendment of October 4, 1944 (9 F. R. 12199). The amendment has no relevance in this case.

[2] The words "or age 38 through 44" were eliminated by an amendment of October 4, 1944 (9 F. R. 12199). The amendment has no relevance in this case.

port to the local board in writing any fact that might result in such registrant being placed in a different classification. (6 F. R. 6844.)

STATEMENT

Count 2 of a two-count indictment filed July 26, 1945 (R. 3), in the District Court for the Eastern District of New York charged petitioner and others with having knowingly refrained from disclosing to petitioner's local draft board facts in respect of his liability for selective service, to wit, that from June 3, 1944, to December 31, 1944, petitioner was not employed by the Universal Camera Corporation and that his employment had terminated on or about June 3, 1944, in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 626.1 (b), *supra* (R. 5–6).[3] Petitioner waived a jury trial (R. 11–12) and was found guilty by a judge (R. 2, 125). He was sentenced to imprisonment for one year (R. 2, 46). On appeal, the judgment of conviction was affirmed (R. 136).

The case was submitted on a stipulation of facts (R. 17–32) and exhibits (R. 24, 26, 30, 31,

[3] Count 1, charging the same defendants with conspiracy to commit the substantive offense charged in count 2 (R. 4–5), was dismissed as to all the defendants on motion of the Government (R. 8, 11). Also on motion of the Government, count 2 was dismissed as to all the defendants except petitioner (R. 47).

44, 48–110). The facts may be summarized as follows:

Petitioner, an attorney (R. 18), was classified in class III–A by his local board on March 24, 1941 (R. 19). On September 4, 1943, he was advised by the board that his occupation (counsel to and assistant purchasing agent for Transogram Company, a toy manufacturing concern (see R. 56)) was non-deferable and that he would have to transfer to some other type of employment or be reclassified to class I–A for induction (R. 19–20). On September 10, 1943, petitioner applied for employment as "night supervisor" at the Universal Camera Corporation (hereafter referred to as "Universal"), and on September 13, 1943, he began to work there (R. 20). On September 14, 1943, Universal notified the local board that petitioner was employed by it and that it was "doing critical war work for the Army and Navy" (R. 20–21). On September 18, 1943, the local board notified petitioner that it had "read and considered the letter from the Universal Camera Corporation and in view of same, continues you in classification 3A" (R. 21).

On November 8, 1943, Universal sent to the local board a "42A" form on behalf of petitioner, and stated that it had "been authorized by Selective Service Headquarters to add his name to our replacement schedule" (R. 21). The 42A form stated that petitioner was "supervisor of the sealing division of the binocular assembly department

on the 3:30 P. M. to 12 midnight shift," and that it would take "over six months" to replace him (R. 21–22). An instruction on this form stated that the form was "to be filled out by an employer or other person who has knowledge of the registrant's eligibility for Class II deferment as a necessary man in his civilian occupation or activity" (R. 77).

On February 4, 1944, petitioner sent to the local board a supplemental affidavit stating that he was employed by Universal at 87½ cents per hour; that Universal did "100% war work;" that he was still attorney for Transogram Company, receiving a bi-weekly salary of $155 plus additional legal fees paid on a contingent basis; that he was part owner of Playwood Plastics Company, a subsidiary of Transogram, from which he received $200 per month; but that he was "required to devote little time to these companies and devotes a full time week to his work in Universal Camera Co." (R. 79).

On February 22, 1944, Universal sent another 42A form to the local board on behalf of petitioner, and advised the board that another replacement schedule had been approved (R. 22–23, 81).

On March 4, 1944, the local board reclassified petitioner to class I–A (R. 62), and on March 30, 1944, petitioner was so advised (R. 23, 62). On April 4, 1944, petitioner asked the board for a hearing in respect of his reclassification (R. 23, 86), and on April 5, 1944, the board advised him

that "You will have a hearing after you pass your physical examination" (R. 23, 87). However, he was not notified to appear for any hearing or physical examination (R. 23).

On May 22, 1944, Universal sent to the local board on behalf of petitioner a "42B" form, which was similar in nature and purpose to the earlier 42A forms (R. 23, 88). This form advised the board that Universal was "doing 100% critical war work for the U. S. Navy," and that petitioner was employed full time (R. 88, 89).

On June 3, 1944, petitioner ceased working at Universal, received no further pay, and never returned there to work (R. 17, 23, 26, 33). A Universal "notice of termination of service" slip, dated September 28, 1944, was filed in the company's files. It stated that petitioner was on "leave of absence. Ill health. Drs. note on file." (R. 92.)

On July 5, 1944, the local board reclassified petitioner to class II–B, and on July 8, 1944, notified him to that effect (R. 25, 41, 62). The notification card contained the usual admonition, "The law requires you: (1) To keep in touch with your local board; * * * (3) to notify it of any fact which might change your classification; * * *" (R. 31, 110).

On December 20, 1944, petitioner was questioned at New York City Selective Service Headquarters for the purpose of determining why he had not notified his local board that he had ceased

working at Universal (R. 27–28, 94–97). Petitioner explained that the reason he had not done so was "because I left with the assumption I was going to be called back. I wasn't fired, and I didn't quit. The production manager told me he didn't know whether I could have a leave for a week or two or a month. * * * I requested a leave of absence. The work on the night shift was petering out at the time. * * * I wasn't feeling well. * * * I went to a doctor and had myself checked. I have had bleeding from the rectum. My stomach wasn't feeling too well. * * *." He further stated that he had submitted a doctor's certificate to Universal. (R. 96.)

On December 26, 1944, petitioner wrote to his local board that "I had been on sick leave from Universal Camera Corp. * * *. Since I have been able to assume work again, the night shift had been dropped as the Navy binocular program had been completed. I was advised by Universal that I would be recalled to work as soon as the new Army program was started on the night shift * * *. I have again checked with the company and they are unable to give me definite information as to the date when I will be recalled. I have been advised to supply my draft board with the above information although my services have not been terminated by Universal Camera Corp." (R. 25–26, 91).

On February 2, 1945, petitioner was interviewed by agents of the Federal Bureau of Investigation (R. 29). He signed a statement reading, in part, as follows:

> * * * My second classification of 1A was dated in March, 1944. I wrote my board that I wished to appeal this classification * * * because at that time I was employed by the Universal Camera Corp., New York which was engaged 100% in National Defense work. I was notified by my board thru a new classification card that I was in 2B classification. This is the last classification I received. I did not personally appeal my 1A classification before the draft board but I assumed that the company had filed a deferment for me. When I received my 1A card, I showed it to the personnel office and they made a note of it * * *. (R. 99.)

Petitioner further stated to the F. B. I. agents that up to January 1, 1944, he worked his full shift, but that thereafter, because his work began to slacken, he checked himself out around 10:30 p. m. (R. 100).

Throughout the period during which petitioner was working for Universal on the night shift, he continued to work for the Transogram Company, and he also continued this work after he stopped working at Universal (R. 27).

ARGUMENT

1. Petitioner contends that the stipulated and undisputed evidence was insufficient to show that he knowingly violated the selective service regulation in question by failing to report his changed employment status to his local board (Pet. 4, 5, 17–26). We submit, however, that the evidence was ample to justify the trial judge's inference (R. 123) that petitioner's failure to report was knowing and wilful. Petitioner certainly was well aware that his II–B classification was due solely to the fact that he was engaged in "100% war work" for Universal (see pp. 6–9, *supra*). Nevertheless, for more than six months after he physically ceased to work at Universal, he failed to report that fact to his board, and finally advised his board of the facts only after he had been called to Selective Service Headquarters for questioning concerning his status. Under those circumstances, we think it immaterial whether his cessation of work is denominated a "leave of absence" or "termination of employment."[4] Petitioner was, as noted by the circuit court of appeals, "a lawyer who had some familiarity with the duties of registrants as well as a registrant to whom a card had been given on which he was ad-

[4] For this reason we think petitioner's challenge of his conviction on the ground that the indictment alleged the unreported fact to be a termination of employment, whereas the evidence disclosed a mere leave of absence (Pet. 4, 27–31), is likewise baseless.

monished '(3) to notify it (the local board) of any fact which might change your classification' " (R. 135). Certainly, to any man of intelligence who knew his II–B classification was due to his being engaged in war work, it should have been clear that he was under an obligation to advise his board when his engagement in such work in fact ceased. As the circuit court of appeals further remarked, "Though failure to report a short leave of absence could well have been due to his belief that he would soon be at work again, that excuse could hardly within reason continue as month succeeded month without the occurrence of anything, so far as the record shows, to justify him in retaining that belief. On the contrary it was an amply justified inference that his failure to report that he was not at work was due to his desire to have that fact remain undisclosed to his local board so long as possible in order to prevent or delay his reclassification into a non-deferred class" (R. 135).[5]

2. Petitioner also contends that "Not only did [he] not knowingly fail and neglect to advise his Local Board of a fact that might result in his being placed in a different classification, but no such fact existed" (Pet. 32). He urges that "his classification would not have been * * * affected one way or the other" by his disclosure to

[5] See also the observations of the trial judge disclosing the grounds on which he inferred scienter on the part of petitioner (R. 123–125).

his board of the fact that he was no longer doing war work for Universal (*ibid.*). In support of this contention, he cites various Bulletins issued by the New York City Selective Service Headquarters to local boards, from May to November 1944, indicating that "the Army and the Navy do not want men over 26 years of age for the time being" (Pet. 33); that men between 30 and 37 years of age[6] "should be granted occupational deferments if they are 'regularly engaged' in activities in support of the national health, safety or interest" (Pet. 34); that it was not required that men in this age group be "necessary men," the importance or lack of importance of their jobs being immaterial (*ibid.*), etc. (see Pet. 33–39). Petitioner's contention is without merit.

In the first place, notwithstanding the liberalized policy of Selective Service Headquarters in regard to occupational deferments, there was throughout the period from June 3 to December 31, 1944, a clear-cut distinction between classes II–A and II–B (see p. 3, *supra*). Class II–B, the higher-ranking occupational deferment classification, was reserved for men regularly engaged in an activity in war production. Class II–A was a lower-ranking classification, being for men regularly engaged in an activity in support of the national health, safety, or interest. Petitioner had every reason to believe, therefore, that if his

[6] Petitioner was 35 years old when he discontinued working for Universal on June 3, 1944 (see R. 18).

local board had been aware that he was no longer "regularly engaged in" an activity in "war production" (as he certainly was not after June 3, 1944), it would not continue him in Class II–B. The most that he had a right to expect, even under the liberalized occupational deferment policy, was that he would be placed in Class II–A. This would be on the assumption (and we may so assume, *arguendo*) that his occupation as counsel to and assistant purchasing agent for a toy manufacturing concern, the only occupation in which he was "regularly engaged" after June 3, 1944, would be deemed by the board to be an occupation in an activity "in support of the national health, safety, or interest." Consequently, since regulation 626.1 (b) required petitioner to report "any fact that might result in [his] being placed in a different classification" (and his notification card advising him of his II–B classification also warned him of this duty), he was required to report his cessation of war production work notwithstanding that he might continue to be deferred on another basis.

Secondly, petitioner manifestly had no right to assume that his local board would retain him in any deferred classification if it became aware that his work in war production had ceased. He had no right to substitute his own discretion for that of his local board in this respect. The exercise of judgment as to the classification of a registrant has always been exclusively that of the local

boards, subject, of course, to the registrant's right of appeal. *Falbo* v. *United States,* 320 U. S. 549, 552; and see regulation 622.23 (a), *supra,* p. 3. Indeed, New York City Selective Service Headquarters Bulletin No. 118, dated June 9, 1944, specifically provided that—

> Notwithstanding the liberalized policies regarding occupational classification, it still remains the duty and responsibility of registrants and employers to notify Local Boards in *writing* of any facts which might affect a registrant's classification. (Section 626.1 of the Regulations.) All terminations and changes of employment must be reported promptly. [Italics in the original.]

Furthermore, no one could foresee when an emergency, or an immediate call for men, would necessitate a quick review by the local boards of their files. On any such new call for men the local boards were entitled to have every pertinent fact available to make instant decisions. They were entitled to have a full and true record on every registrant.[7]

Finally, there was no evidence that petitioner knew of the contents or the existence of the bulle-

[7] Just such an emergency in fact arose in December 1944. Bulletin No. 129, dated December 11, 1944, contained a telegram from National Selective Service Headquarters stating as follows:

"There is continuing urgent need for combat replacements in the European and Pacific theatres of war and a most critical shortage of workers in war activities.

"It is increasingly necessary that all persons, and particu-

tins he now relies on. They were not relevant, therefore, to his intent or state of mind during the period when he allegedly failed to report his changed occupational status.[8]

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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AUGUST 1947.

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larly registrants eighteen through thirty-seven, participate to the full extent of their ability either in the Armed Forces or in the civilian war effort.

* * * * *

"Selective Service Regulations and Memoranda are being amended to provide that when an occupationally deferred registrant leaves the employment for which he has been deferred, he shall be reclassified into a class immediately available for service * * *."

[8] Petitioner also contends that the terms of Selective Service Regulation 626.1 (b) are too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it (Pet. 4–5, 41–48). The contention is without merit. *Stassi* v. *United States*, 152 F. 2d 581, 582 (C. C. A. 5), certiorari denied, 328 U. S. 842; see also our briefs in opposition to certiorari in the *Stassi* case (No. 971, O. T. 1945, pp. 7–10), and in *Perniciaro* v. *United States*, No. 1085, O. T. 1946, pp. 8–9, certiorari denied April 14, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947